Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JORGE HERNANDEZ-CASTILLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit's presumption of the reasonableness of sentences within the *Federal Sentencing Guidelines* comports with the constitutional requirements set forth in *United States v. Booker*, 543 U.S. 220 (2005).

2. Whether the Tenth Circuit's application of a mandatory "two-step" review process actively discourages district court judges from deviating from the *Federal Sentencing Guidelines* in favor of defendants when appropriate.

3. Whether the categorical characterization of consensual sexual contact between teenagers as "statutory rape" and a crime of violence under the *Federal Sentencing Guidelines* is proper.

PARTIES

The parties to proceeding in the Tenth Circuit Court of Appeals are Jorge Hernandez-Castillo, Petitioner and the United States of America, Respondent.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE FACTS	6
REASONS FOR GRANTING THE PETITION	10
I. The various Circuit Courts of Appeals differ on whether to apply a presumption of reasonableness to the *Sentencing Guidelines*	10
II. Tenth Circuit published decisions under *Kristl* actively discourage district court judges from deviating from the *Sentencing Guidelines* in favor of defendants contrary to the Supreme Court Opinion in *United States v. Booker*	13
III. The various Circuits disagree on the categorical characterization of teenage sex as "statutory rape" and a crime of violence under the *Sentencing Guidelines*	16
CONCLUSION	18

TABLE OF AUTHORITIES

Page

U.S. SUPREME COURT CASES

Daniels v. United States, 532 U.S. 374 (2001) 18

Ewing v. California, 538 U.S. 11 (2003) 18

United States v. Booker, 543 U.S. 220 (2005) 6, 11, 12, 16, 18

COURT OF APPEALS CASES

Guzman-Balbuena v. United States, No. 05-10634 10

United States v. Cage, 451 F.3d 585 (10th Cir. 2006) 14

United States v. Calzada-Maravillas, 443 F.3d 1301 (10th Cir. 2006) 16

United States v. Chavez-Diaz, 444 F.3d 1223 (10th Cir. 2006) 13

United States v. Cooper, 437 F.3d 324 (3rd Cir. 2006) 11

United States v. Dozier, 444 F.3d 1215 (10th Cir. 2006) 15

United States v. Fernandez, 443 F.3d 19 (2nd Cir. 2006) 11

United States v. Galarza-Payan, 441 F.3d 885 (10th Cir. 2006) 14

United States v. Gillespie, 452 F.3d 1183 (10th Cir. 2006) 15

United States v. Harris, 447 F.3d 1300 (10th Cir. 2006) 15, 16

United States v. Hernandez-Castillo, 449 F.3d 1127 (10th Cir. 2006) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

United States v. Houston, 364 F.3d 243 (5th Cir. 2004) 17

United States v. Jimenez-Beltre, 440 F.3d 514 (1st Cir. 2006) 11

United States v. Kristl, 437 F.3d 1050 (2006) 6, 10, 11, 12, 13

United States v. Lincoln, 413 F.3d 716 (8th Cir. 2006) 11

United States v. Lopez-Flores, 444 F.3d 1218 (10th Cir. 2006) 15

United States v. Mares, 441 F.3d 1152 (10th Cir. 2006) 15

United States v. Martinez, 455 F.3d 1127 (10th Cir. 2006) 15

United States v. Mykytiuk, 415 F.3d 606 (7th Cir. 2005) 11

United States v. Rockey, 449 F.3d 1099 (10th Cir. 2006) 14

United States v. Rodriguez-Quintanilla, 442 F.3d 1254 (10th Cir. 2006) 13

United States v. Sanders, 449 F.3d 1087 (10th Cir. 2006) 15

United States v. Terrell, 445 F.3d 1261 (10th Cir. 2006) 14

STATE CASES

In re Kyle F., 5 Cal. Rptr.3d 190 (Cal. App. 5th Dist. 2004) 17

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES

Cal. Penal Code § 261.5 7

Cal. Penal Code § 261.5(c) 7

FEDERAL STATUTES

8 U.S.C. § 994(a)(2) 4

8 U.S.C. § 1326(a) 7

8 U.S.C. § 1326(b)(2) 7

18 U.S.C. § 3553 6

18 U.S.C. § 3553(a) 2, 11, 15

18 U.S.C. § 3553(a)(1) 16, 18

18 U.S.C. § 3553(b)(1) 11

18 U.S.C. § 3563(b)(6) or (b)(11) 2

18 U.S.C. § 3742 2

18 U.S.C. § 3742(g) 4

28 U.S.C. § 994(a)(1) 2

28 U.S.C. § 994(a)(3) 4

28 U.S.C. § 994(p) 3, 4

28 U.S.C. § 1254 (1988) 1

U.S. Sentencing Guidelines 2L1.2 ..... 4, 5

OTHER AUTHORITIES

Frank O. Bowman, III, *The Year of the Jubilee . . . Or Maybe not: Some Preliminary Observations about the Operation of the Federal Sentencing System after Booker*, 43 Hous. L. Rev. 279 (2006) 11

OPINION BELOW

The opinion below is published as *United States v. Hernandez-Castillo*, 449 F.3d 1127 (10th Cir. 2006). The Tenth Circuit Court of Appeal's Order denying petitioner's petition for rehearing was not published, but is included in the Appendix.

JURISDICTION

The Tenth Circuit Court of Appeals filed its Order denying petitioner's petition for rehearing on August 2, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Six

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. § 3742

(a) Appeal by a defendant. – A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

18 U.S.C. § 3553(a)

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing

Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 8, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

Sentencing Guidelines 2L1.2

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) **Apply the Greatest:**

If the defendant previously was deported, or unlawfully remained in the United States, after –

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels;

(C) a conviction for an aggravated felony, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

Sentencing Guidelines § 2L1.2, Application Note (B)(iii)

(iii) "Crime of violence" means any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or

threatened use of physical force against the person of another.

STATEMENT OF THE FACTS

This case is an early Tenth Circuit attempt to apply the excised version of 18 U.S.C. § 3553 established by Part II of *United States v. Booker*, 543 U.S. 220, 245 (2005). The sentencing hearing in this case took place on May 25, 2005, approximately four mouths after *Booker* was decided. App. at 11.

The briefing before the Tenth Circuit Court of Appeals for the present case was completed on December 12, 2005. Oral argument was held May 12, 2006. The Tenth Circuit decision, *United States v. Kristl,* 437 F.3d 1050 (2006), which established a presumption of reasonableness for sentences within the *Sentencing Guidelines* and a mandatory "two-step" process for the review of sentencing decisions was entered on February 17, 2006, between the briefing and oral argument in the present case. The Tenth Circuit opinion, which relied upon the *Kristl* review process, was written by a member of the reviewing panel who was not in attendance at oral argument on May 12, 2006. Thus, Petitioner's counsel was deprived of the opportunity to address the opinion writer's reliance upon the *Kristl* review process. This is important in the present case because the published Tenth Circuit opinion stated that Petitioner's sentence was unreasonable, but that the Court would not grant relief because Petitioner's counsel had not properly raised a reasonableness challenge. *Hernandez-Castillo*, 449 F.3d at 1131-1132.

Petitioner was indicted for violation of 8 U.S.C. § 1326(a) and 8 U.S.C. § 1326(b)(2) for reentry of a deported alien on November 4, 2004. Petitioner entered into a plea agreement on March 9, 2005. The pre-sentencing report requested an enhancement because of a 1998 prior conviction for violation of Cal. Penal Code § 261.5, unlawful sexual intercourse with a person under eighteen. Cal. Penal Code § 261.5(c) provides that:

> (c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator, is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison.

The circumstances of the California conviction were that in 1997 Petitioner had sexual contact with Ana Mejia. At the time of the sexual contact, Defendant was eighteen years old and Ana Mejia was fourteen and a half years old and both teenagers were living in the house of Ana Mejia's parents. The contact resulted in a child, Brenda Mejia, who was born on January 8, 1998.

Defendant testified at the sentencing hearing that:

> . . . I haven't raped anybody because her mother and everybody was in agreement that I would be with her. And I didn't know it was a crime to be with a minor in this country, and I am paying very much for this.

TR at 8, lines 7-11, App. at 24-25.

In April 1998, Petitioner appeared in the California Superior Court for the county of Los Angeles on a charge of

unlawful sexual intercourse with a person under eighteen. According to that Court's minute order:

> The court ordered the following judgment: . . .
>
> Imposition of sentence suspended
>
> Defendant placed on formal probation
>
> for a period of 004 years under the following terms and conditions:
>
> serve 157 days in Los Angeles County Jail
>
> Defendant given total credit for 157 days in custody 105 days actual custody and 52 days good time/work time.

Minute Order, App. at 31. The Court also ordered psychological counseling, employment training and that Petitioner "support dependents as directed by the probation officer." Minute Order, App. at 31.

Thereafter, Petitioner remained in contact with Ana Mejia and his daughter and contributed to their support. All of this evidence was presented to the Federal District Court at the sentencing hearing. TR at 4-6, 8, App. at 21-22.

The Federal District Court judgment was entered on May 25, 2005, the same day as the sentencing hearing. TR at 11-12, App. at 11. The Federal District Court, in comments from the bench, focused on Petitioner's 1998 conviction which it characterized as "statutory rape." TR at 9-10, App. at 26. The Federal District Court found that a 16 level sentence enhancement for "statutory rape or some sort of sexual contact with a minor" was appropriate, and that a 57 month sentence was reasonable. TR at 11, lines 19-20, 24-25, App. at 26.

The Tenth Circuit Court of Appeals opinion found that Petitioner's California offense was "statutory rape" even though the charge stemmed from "a consensual sexual relationship Mr. Hernandez-Castillo had with a younger girl many years ago, with parental consent, when both were teenagers." *Hernandez-Castillo,* 449 F.3d at 1131.

The Tenth Circuit also found that under the California "wobbler" law, the misdemeanor sentence in the minute order was not a misdemeanor judgment because Petitioner's sentence had been suspended. *Hernandez-Castillo,* 449 F.3d at 1130. The Tenth Circuit opined that:

> . . . if the state court had been more severe toward Mr. Hernandez-Castillo, by requiring him to serve a few more days in jail instead of allowing him to be released immediately, his offense would be classified as a misdemeanor and his guidelines range would be 6 to 12 months.

Hernandez-Castillo, 449 F.3d at 1132. Thus, the Tenth Circuit held that the felony enhancement had to be applied as a matter of law even if it unreasonably made a misdemeanor sentence into a felony, merely because the defendant was given credit for the pre-trial time he spent in jail:

> We wonder if California judges are aware of the momentous consequences under federal law of their decision whether to denominate wobbler offenses explicitly as misdemeanors.

Hernandez-Castillo, 449 F.3d at 1132.

The Tenth Circuit opinion held out an illusion of a remedy for Petitioner by opining that even though the prior conviction was properly characterized as a felony and a crime of violence, he could have been given a reduced

sentence on grounds of reasonableness, but because Petitioner's lawyer challenged the characterization of the prior conviction, rather than the reasonableness of the sentence, the court refused to grant relief:

> One might consider this the obvious case where an exercise of *Booker* discretion could mitigate a sentence that does not fit the particular facts of the case, . . . but unfortunately for Mr. Hernandez-Castillo, his lawyer has not challenged the reasonableness of the sentence.

Hernandez-Castillo, 449 F.3d at 1132. The Tenth Circuit's statement is only true in the formal sense that counsel did not brief the *Kristl* analysis, which was handed down after the briefing was complete. This is also the reason why the opinion writer's failure to attend oral argument is so prejudicial to Petitioner.

REASONS FOR GRANTING THE PETITION

I. The various Circuit Courts of Appeals differ on whether to apply a presumption of reasonableness to the *Sentencing Guidelines*.

A. There is a Circuit split on the presumption issue.

Petitioner is aware of at least one pending Petition for Writ of Certiorari seeking to challenge the presumption of reasonableness of sentence made in accordance with the *Sentencing Guidelines*, as enforced in the Fourth Circuit Courts of Appeals. *Guzman-Balbuena v. United States*, No. 05-10634, "distributed for conference of September 25, 2006." If this Court grants the *Guzman-Balbuena* petition from the Fourth Circuit or some other petition raising the

same issue, Petitioner requests that his case be consolidated for the purpose of settling the issue of the judicial presumption of reasonableness of all sentences within the *Sentencing Guidelines*.

Part II of *United States v. Booker*, 543 U.S. at 245 and 259, excised the provision in 18 U.S.C. § 3553(b)(1) making the *Sentencing Guidelines* mandatory and held that the appellate courts could review the sentencing to determine whether it was "reasonable" under the factors listed in 18 U.S.C. § 3553(a). The *Booker* court did not explain what weight should be given to the *Sentencing Guidelines* in the determination. The Tenth Circuit, in *Kristl*, 437 F.3d at 1055 (10th Cir. 2006), following the Seventh and Eighth Circuits, *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005) and *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005), adopted a presumption of reasonableness which had to be specifically rebutted by the defendant. The First, Second and Third Circuits have rejected the presumption or any other *per se* rule in reviewing sentencing decisions. *United States v. Jimenez-Beltre*, 440 F.3d 514, 517-518 (1st Cir. 2006); *United States v. Fernandez*, 443 F.3d 19, 27 (2nd Cir. 2006); and *United States v. Cooper*, 437 F.3d 324, 331 (3rd Cir. 2006). This constitutes a circuit split which has serious implications for all sentencing under the *Sentencing Guidelines*.

Specifically, the circuit split restores the lack of uniformity of sentencing rules which the *Sentencing Guidelines* were intended to alleviate. For a statistical analysis of the effect of *Booker* on sentencing in the various circuits, see, Frank O. Bowman, III, *The Year of the Jubilee . . . Or Maybe not: Some Preliminary Observations about the Operation of the Federal Sentencing System after Booker*, 43 Hous. L. Rev. 279 (2006).

B. The presumption of reasonableness of a sentence within the *Sentencing Guidelines*, as applied in the present case effectively makes the *Sentencing Guidelines* mandatory.

The present case is a prime example of the unfairness of the rigid application of the *Sentencing Guidelines* which the *Booker* court sought to remedy. The Tenth Circuit Court of Appeals believed that Petitioner's sentence was unreasonable because: (1) the sentence had been enhanced 16 levels through the categorical characterization of consensual teenage sex as a crime of violence; (2) Petitioner subsequently visited and supported his natural daughter and her mother; and (3) the California "wobbler" law was applied in a manner which was contrary to the sentence actually imposed by the California Superior Court. *Hernandez-Castillo*, 449 F.3d at 1131-1132. Nevertheless the Tenth Circuit Court of Appeals refused to grant relief to Petitioner because his attorney, who brought the Petitioner's characteristics and history to the attention of both the district and the appellate court, did not follow the "two-step" paradigm which was set forth in *Kristl*, a Tenth Circuit decision made after the appellate briefing was completed. Specifically, the Tenth Circuit ruled that Petitioner's attorney did not "challenge" the presumption of reasonableness and therefore the Court could not grant relief to the Petitioner. *Hernandez-Castillo*, 449 F.3d at 1132, " . . . unfortunately for Mr. Hernandez-Castillo, his lawyer has not challenged the reasonableness of the sentence."

It is necessary for this Court to clarify the *Booker* review process in order to prevent the re-establishment of the mandatory nature of the *Sentencing Guidelines*

through the application of another layer of judicially crafted limitations and presumptions. Judicial discretion to depart from the *Sentencing Guidelines* when the *Guidelines* result in an unreasonable result is not enhanced by a general presumption that all sentences within the *Sentencing Guidelines* are reasonable until explicitly proven otherwise.

II. Tenth Circuit published decisions under *Kristl* actively discourage district court judges from deviating from the *Sentencing Guidelines* in favor of defendants contrary to the Supreme Court Opinion in *United States v. Booker*.

In addition to the circuit split on the presumption of reasonableness, a review of published Tenth Circuit opinions under the *Kristl* "two-step" rule demonstrates that the presumption of reasonableness, as applied by the Tenth Circuit, effectively prevents any downward deviation from the *Sentencing Guidelines* in favor of defendants.

The Tenth Circuit wasted no time in the *post-Booker* era issuing a series of opinions to ensure that the status quo would be maintained no matter how tortured it would become for a hapless defendant seeking *Booker* relief.

A brief, but entertaining sojourn down this convoluted odyssean path follows.

United States v. Rodriguez-Quintanilla, 442 F.3d 1254, 1257-1258 (10th Cir. 2006), held that *Booker* did not apply to cases involving revocation of supervised release. *United States v. Chavez-Diaz*, 444 F.3d 1223, 1229 (10th Cir. 2006), held, very confusingly, that the Court of Appeals lacked jurisdiction to review a denial of a request for

deviation downward from the *Sentencing Guidelines*, but it could review the sentence which was actually imposed for reasonableness if the issue was properly presented. The distinction between evidence presented as an objection to a sentencing request and evidence presented for an assessment of reasonableness is a distinction without a difference, which merely makes it more difficult for defendants to "preserve error."

United States v. Terrell, 445 F.3d 1261, 1265 (10th Cir. 2006), held that district courts, as well as reviewing courts, had to apply a presumption that the sentencing under the *Sentencing Guidelines* was reasonable. *United States v. Rockey*, 449 F.3d 1099, 1105 (10th Cir. 2006), affirmed a sentence because the defendant's argument in favor of deviation was too perfunctory.

United States v. Galarza-Payan, 441 F.3d 885, 890 (10th Cir. 2006), held that long-term residence in the United States and "cultural assimilation" was not a factor to be considered in the reasonableness analysis of illegal re-entry sentencing because "families' lives are torn by the border" on a regular basis under current immigrations laws. In other words, if unreasonableness is commonplace, it is no longer considered to be unreasonable. In line with this reasoning, the Tenth Circuit's only published reversal of a sentence on grounds of unreasonableness was *United States v. Cage*, 451 F.3d 585 (10th Cir. 2006), where the Court of Appeals, at the request of the Government, reversed a downward deviation which the district court made on behalf of a single mother. The Tenth Circuit reasoned that the imposition of prison time for single mothers, leaving their children unattended, was "not very uncommon" and "not dramatic enough to warrant such an extreme downward variance." *Cage*, 451 F.3d at 596.

United States v. Lopez-Flores, 444 F.3d 1218, 1222 (10th Cir. 2006), held that district courts do not have to explain how an application of the factors in 18 U.S.C. § 3553(a) justify the sentence. Unlike the defendant, the district court does not have to recite "any magic words." *Id.*; see also, *United States v. Martinez*, 455 F.3d 1127, 1132 (10th Cir. 2006), "magic words" not needed; and *United States v. Mares*, 441 F.3d 1152, 1161 (10th Cir. 2006), holding the district court did not need "magic words" to state it considered the defendant's family situation as a mother of two small children, but that the defendant erred by failing to "explicitly present her family's situation in terms of § 3553(a)(1)." "Magic words" are required from the defendant, but not the court.

United States v. Sanders, 449 F.3d 1087 (10th Cir. 2006), affirmed the decision of the district court, after an "evidentiary hearing" that the defendant's alleged verbal threats, when he was not carrying his gun, was sufficient to support a firearm enhancement. *United States v. Gillespie*, 452 F.3d 1183, 1192 (10th Cir. 2006), affirmed a district court finding of reasonableness because arson is an "act of violence." *United States v. Harris*, 447 F.3d 1300, 1306-1307 (10th Cir. 2006), held that the separateness of the defendant's prior convictions was not a fact which was subject to *Booker* at all in a *Sentencing Guidelines* enhancement for three prior felony convictions. That is, the court did not have to consider whether the defendant's three prior convictions concerned a single incident rather than three separate criminal acts.

Two published cases vacated the defendant's sentence because the district court failed to give the defendant notice that his sentence was to be deviated upward before the sentencing hearing. *United States v. Dozier*, 444 F.3d

1215 (10th Cir. 2006); *United States v. Calzada-Maravillas*, 443 F.3d 1301 (10th Cir. 2006). This due process error would have been corrected without *Booker*.

The Tenth Circuit regularly recites the non-mandatory application of the *Sentencing Guidelines*, but the published cases demonstrate that it is almost impossible to justify a deviation downward in favor of a defendant. As Frank Bowman, *supra*, concludes, *Booker* has not resulted in any significant change in sentencing under the *Sentencing Guidelines*. The appellate courts have found technical ways to effectively nullify Part II of *Booker*.

III. The various Circuits disagree on the categorical characterization of teenage sex as "statutory rape" and a crime of violence under the *Sentencing Guidelines*.

Part I of *Booker*, 543 U.S. at 244, held that any fact, other than a prior conviction, which is necessary to enhance a sentence must be established by a plea of guilty or proven to a jury beyond a reasonable doubt. The *Booker* Court did not explain what facts concerning a prior conviction were to be excluded. The Tenth Circuit has taken a broad view of the facts concerning a prior conviction in order to exclude evidence of the circumstances of the prior conviction from a reasonableness consideration. See, *Harris*, 447 F.3d at 1307, holding that facts concerning the separateness of multiple prior convictions was not to be considered by the sentencing court. In short, consideration of a defendant's history and characteristics under 18 U.S.C. § 3553(a)(1) stops when the evidence presented involves a prior conviction.

The present case turned on Petitioner's prior conviction for sexual contact with a teenage minor when he was still a teenager. California law recognizes that minors over the age of fourteen are capable of engaging in consensual sex for purposes of establishing paternity rights. *In re Kyle F.*, 5 Cal. Rptr.3d 190, 194 (Cal. App. 5th Dist. 2004). The district court based its categorization of the offense on the out-dated theory that "the minor victim cannot consent as a matter of law to sexual intercourse with an adult." TR at 10, lines 11-13, App. at 26. The Tenth Circuit opinion affirmed this holding. *Hernandez-Castillo*, 449 F.3d at 1131.

Although both the Tenth Circuit and the Fifth Circuit have adopted a "categorical" approach to illegal teenage sex, the Fifth Circuit has held that consensual sex between teenagers was not a crime of violence, giving rise to a 16 level enhancement upon sentencing, whereas in the present case, the Tenth Circuit held that consensual teenage sex was a crime of violence, citing to California case law decided prior to *In re Kyle F.* Compare *Hernandez-Castillo,* 449 F.3d at 1131, with *United States v. Houston*, 364 F.3d 243, 247-248 (5th Cir. 2004), holding that sexual contact between a twenty year old man and a fourteen year old woman, absent aggravating circumstances, was not "statutory rape" because it was not physically dangerous. This constitutes a significant Circuit split on the application of the *Sentencing Guidelines'* enhancement for a crime of violence which should be resolved by this Court.

This Court should also revisit the "categorical" application of the California "wobbler" rule which it held was not a violation of the Eighth Amendment's prohibition of cruel and unusual punishment as applied to the California

three strikes' law in a case involving a defendant with a long history of criminal recidivism. *Ewing v. California*, 538 U.S. 11, 28-31 (2003). Unlike *Ewing*, the California Superior Court actually resolved *Hernandez-Castillo's* teenage indiscretions through probationary counseling and made him into a responsible father. This mitigating evidence can be considered by the court under 18 U.S.C. § 3553(a)(1), without doing any violence to the general prohibition against collateral attacks on prior convictions. *Daniels v. United States*, 532 U.S. 374 (2001).

CONCLUSION

This Court in *Booker*, 543 U.S. at 259-261, recognized the appellate courts' familiarity with a reasonableness test. Appellate courts are also familiar with the use of judicial presumptions as a device for avoiding any substantive review. Despite a repeated verbal recognition that the *Sentencing Guidelines* are no longer mandatory, the Tenth Circuit Court of Appeals and a number of sister circuits have created a judicial presumption, which effectively nullifies Part II of *Booker* by making the test for an unreasonable sentence impossible for any defendant to meet.

If this Court intends Part II of *Booker* to have any continued viability, this Courts needs to establish: (1) non-presumptive standards for consideration of the reasonableness of a sentence; and (2) rules on the use of mitigating evidence of a defendant's history presented as part of the evidence concerning a prior conviction in a reasonableness assessment. In the present case, the consensual nature of Petitioner's sexual contact and Petitioner's post-conviction

history should be considered in the reasonableness analysis, even if the evidence was first presented to dispute the characterization of the prior conviction as a crime of violence. In short, an unreasonable sentence is unreasonable regardless of whether the defendant uses the "magic words."

This Court should grant the petition for a writ of certiorari and reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JORGE HERNANDEZ-CASTILLO, Defendant-Appellant.	No. 05-2157

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. NO. 04-CR-02210)

(Filed June 6, 2006)

James P. Baiamonte, Albuquerque, New Mexico for Defendant-Appellant.

Norman Cairns, Assistant United States Attorney, (David C. Iglesias, United States Attorney, with him on the brief), Albuquerque, New Mexico for Plaintiff-Appellee.

Before **O'BRIEN**, **McWILLIAMS**, and **McCONNELL**, Circuit Judges.

McCONNELL, Circuit Judge.

Jorge Hernandez-Castillo pleaded guilty to illegally reentering the United States in violation of 8 U.S.C. §§ 1326(a)(1), (a)(2), and (b)(2). At sentencing, the district court enhanced Mr. Hernandez-Castillo's base offense level by 16 points, finding that a prior California conviction for engaging in sexual intercourse with a minor was a felony and a crime of violence. On appeal, Mr. Hernandez-Castillo challenges only the district court's application of an enhancement for a crime of violence. Because we find that the prior California conviction was a felony and a crime of violence, we **AFFIRM** the district court's decision.

I. Background

Mr. Hernandez-Castillo is a Mexican national who lived in the United States as a teenager. When he was eighteen years old, Mr. Hernandez-Castillo was involved in a consensual sexual relationship with Ana Mejia, a fourteen-year old girl. The two had a child, Brenda, who was born on January 8, 1998. Mr. Hernandez-Castillo has remained in contact with Brenda since 1998 and continues to help support her. Because of the four-year age difference between Mr. Hernandez-Castillo and Ms. Mejia, he was charged with several violations of the California Penal Code. He pleaded guilty to having unlawful sexual intercourse with a minor more than three years younger than himself, in violation of California Penal Code § 261.5(c). The California court sentenced Mr. Hernandez-Castillo to a suspended sentence of 157 days in county jail, which amounted to time served, and placed him on formal probation for four years.

On July 3, 1998, after his California conviction, Mr. Hernandez-Castillo was deported from the United States

to Mexico. On July 18, 2004, he reentered the United States and was apprehended at a border patrol checkpoint north of Las Cruces, New Mexico. Mr. Hernandez-Castillo admitted to border patrol agents that he was a citizen of Mexico and that he had illegally entered the United States. He subsequently pleaded guilty to illegal reentry.

The Presentence Report ("PSR") provided that Mr. Hernandez-Castillo's base offense level was 8, pursuant to § 2L1.2(a) of the United States Sentencing Guidelines. The PSR recommended that Mr. Hernandez-Castillo's base offense level be increased by 16 levels, pursuant to § 2L1.2(b)(1)(A)(ii), because his prior California conviction for unlawful sexual intercourse with a minor was a felony and a crime of violence. After a 3-level downward departure for acceptance of responsibility, the PSR provided for an adjusted offense level of 21, a criminal history category of IV, and a recommended guidelines range of 57 to 71 months. At sentencing, the district court adopted the recommendations contained in the PSR and sentenced Mr. Hernandez-Castillo to the low end of the range, 57 months, concluding that such a sentence was reasonable based on the factors set forth in 18 U.S.C. § 3553(a). Mr. Hernandez-Castillo filed a timely appeal, claiming that the district court erred in applying the sixteen-level upward adjustment because his previous California conviction was a misdemeanor, not a felony, and was not a crime of violence.

II. Discussion

After *United States v. Booker*, 543 U.S. 220 (2005), rendered the Sentencing Guidelines advisory, district courts must use a two-step process at sentencing. In Step

1, the district court must consult the Guidelines and apply any applicable upward adjustments and downward departures. Through that process, the district court establishes a total offense level and corresponding sentencing range under the Guidelines. In Step 2, the district court may use its discretion to impose a sentence within the Guidelines range or to vary either upward or downward from that range.

In evaluating sentences imposed under the now-advisory Guidelines, we likewise employ a two-step approach. *United States v. Kristl,* 437 F.3d 1050, 1055 (10th Cir. 2006) (per curiam). First, we consider whether the district court properly applied the Guidelines at Step 1, reviewing its legal determinations *de novo* and its factual findings for clear error. *Id.* Only if we conclude that the district court correctly applied the Guidelines or that any errors were harmless, do we consider whether the ultimate sentence imposed in Step 2 was reasonable, applying a presumption of reasonableness to sentences falling within the Guidelines range. *Id.*

Mr. Hernandez-Castillo does not challenge the reasonableness of the sentence imposed by the district court. Instead, he argues that the district court committed legal error at Step 1 by applying the sixteen-level upward adjustment based on his prior California conviction because his conviction was a misdemeanor, not a felony, and because the sexual relationship was consensual and did not involve the use of force.

The sixteen-level upward adjustment for crimes of violence applies to defendants who were previously deported after "a conviction for a felony that is . . . (ii) a crime of violence." U.S.S.G. § 2L1.2(b)(1)(A). These are

terms of art; we must follow the definitions specified by the guidelines and guidelines commentary, rather than the ordinary sense of the terms. A "felony" is defined as "any federal, state, or local offense punishable by imprisonment for a term exceeding one year." *Id.* at n.2. The crime for which Mr. Hernandez-Castillo was convicted, sexual intercourse with a minor, is referred to as a "wobbler" because it is punishable either as a felony or a misdemeanor:

> Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison.

Cal. Penal Code §§ 261.5(c). Under the California Penal Code, an unspecified prison term in state prison may be for 16 months or two or three years. *Id.* § 18.

A wobbler charged as a felony is treated as a felony for all purposes until judgment. *United States v. Robinson,* 967 F.2d 287, 293 (9th Cir. 1992). A wobbler is converted to a misdemeanor:

> (1) After a judgment imposing a punishment other than imprisonment in the state prison.
>
> * * *
>
> (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.

Cal. Penal Code § 17(b). Although Mr. Hernandez-Castillo received four years' probation and a suspended sentence of 157 days in county jail, his situation does not fall under either of those circumstances.

Mr. Hernandez-Castillo's conviction could have been converted to a misdemeanor under § 17(b)(1) only if a *judgment* imposed a punishment other than imprisonment in state prison. Both parties agree that Mr. Hernandez-Castillo received a sentence other than imprisonment in state prison. Indeed, he received probation and a suspended sentence of imprisonment in county jail. However, neither probation nor a suspended sentence is deemed to be a judgment imposing punishment under California law. *Robinson,* 967 F.2d at 293; *United States v. Gomez-Hernandez,* 300 F.3d 974, 978 (8th Cir. 2002); *People v. Smith,* 16 Cal. Rptr. 12, 13 (Cal. Ct. App. 1961) ("An order granting probation is not a judgment."); *People v. Arguello,* 381 P.2d 5, 6 (Cal. 1963) ("In granting probation after a conviction, the trial court may suspend the imposition of sentence, in which case no judgment of conviction is rendered."). Accordingly, there was no judgment converting Mr. Hernandez-Castillo's conviction to a misdemeanor under § 17(b)(1).

Nor was Mr. Hernandez-Castillo's conviction converted to a misdemeanor under § 17(b)(3). Although § 17(b)(3) applies to grants of probation and suspended sentences, it operates to convert a wobbler into a misdemeanor only when "the court declares the offense to be a misdemeanor." Cal. Penal Code § 17(b)(3). Mr. Hernandez-Castillo has presented no evidence that the sentencing court declared his offense to be a misdemeanor. Indeed, there is some evidence that his offense was treated as a felony. Because his conviction under § 261.5(c) was a

felony punishable by up to three years imprisonment, *see id.* § 18, the district court did not err in classifying Mr. Hernandez-Castillo's California conviction as a felony.

We next turn to Mr. Hernandez-Castillo's argument that his prior conviction was not a crime of violence because his relationship with Ms. Mejia was consensual. The application notes to § 2L1.2(b)(1) define "crime of violence" as:

> any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

U.S.S.G. § 2L1.2 n.1(B)(iii). The offenses listed in the application note to § 2L1.2 "are always classified as 'crimes of violence,' regardless of whether the prior offense expressly has as an element the use, attempted use, or threatened use of physical force against the person of another." *United States v. Munguia-Sanchez,* 365 F.3d 877, 881 (10th Cir. 2004) (emphasis and internal quotation marks omitted). Section 261.5 is California's statutory rape law. *See Michael M. v. Superior Court of Sonoma County,* 450 U.S. 464, 466 (1981); *People v. Osband,* 919 P.2d 640, 734 (Cal. 1996) ("'Statutory rape' is commonly understood to be the offense of unlawful sexual intercourse with a minor (§ 261.5)."). Because § 261.5 is a statutory rape statute and statutory rape is listed in the application note, Mr. Hernandez-Castillo's conviction was for a crime

of violence irrespective of whether his relationship with Ms. Mejia was consensual.

III. Conclusion

Accordingly, the district court did not err in Step 1 by classifying Mr. Hernandez-Castillo's prior California conviction as both a felony and crime of violence. At sentencing, Mr. Hernandez-Castillo's counsel did not challenge the reasonableness of the resulting sentence, and he does not do so here. We therefore affirm the sentence imposed by the district court.

We feel compelled to comment, however, that we have grave misgivings regarding the appropriateness of this 57-month sentence. The sentence results from a sixteen-level enhancement on account of a consensual sexual relationship Mr. Hernandez-Castillo had with a younger girl many years ago, with parental consent, when both were teenagers. Mr. Hernandez-Castillo continues to support and maintain contact with the child, who is now six years old, and also (apparently) maintains contact with the mother. Under the Sentencing Guidelines, this prior act, a statutory rape, is classified as a violent felony, leading to a 16-point enhancement, which translates into about four additional years in federal prison. In reality Mr. Hernandez-Castillo committed no violence and he was punished at the level of a misdemeanor.

The Sentencing Guidelines produce this result by looking to possible punishment rather than actual punishment and by defining all statutory rape as violent regardless of the circumstances. Then there is the added complication of determining whether a California "wobbler" is a felony or a misdemeanor. A "wobbler" is an

offense that may be either a felony or a misdemeanor, but is assumed to be a felony unless, among other things, the state court issues a "judgment" sentencing the defendant to something less than a year in state prison or otherwise explicitly classifies the offense as a misdemeanor. Unfortunately for Mr. Hernandez-Castillo, his actual state court sentence – probation or a suspended sentence – is for some reason not deemed a "judgment" under state law. Thus, although he served only 157 days in the county jail – a sentence appropriate for a misdemeanor and not for a felony – this conviction counts as a felony under state law. It is hard to see the logic in treating imposition of probation or a suspended sentence as something other than a "judgment" for purposes of classifying the offense as a felony or a misdemeanor, but that is what state law dictates. We wonder if California judges are aware of the momentous consequences under federal law of their decision whether to denominate wobbler offenses explicitly as misdemeanors. Ironically, if the state court had been more severe toward Mr. Hernandez-Castillo, by requiring him to serve a few more days in jail instead of allowing him to be released immediately, his offense would be classified as a misdemeanor and his guidelines range would be 6 to 12 months.

One might consider this the obvious case where an exercise of *Booker* discretion could mitigate a sentence that does not fit the particular facts of the case, *see United States v. Trujillo-Terrazas*, 405 F.3d 814, 819-20 (10th Cir. 2005), but unfortunately for Mr. Hernandez-Castillo, his lawyer has not challenged the reasonableness of the sentence. Perhaps the Sentencing Commission will take a hard look at these guideline definitions, and especially at the issue of California "wobblers," to ensure that sentences

imposed under this section are not greater than can be justified.

UNITED STATES DISTRICT COURT
District of New Mexico

UNITED STATES OF AMERICA

V.

Jorge Hernandez-Castillo

Judgment in a Criminal Case
(For Offenses Committed On or After November 1, 1987)

CASE NUMBER: **2:04CR02210-001WJ**

USM Number: **29005-051**

Defendant's Attorney: **James Baiamonte**

THE DEFENDANT:

☒ pleaded guilty to count(s) **Redacted Superseding Indictment**

☐ pleaded nolo contendere to count(s)

☐ after a plea of not guilty was found guilty on count(s)

The defendant is adjudicated guilty of these offenses:

Title & Section	*Nature of Offense*	*Offense Ended*	*Count Number(s)*
8 U.S.C. Sec. 1326(a)(1) and (2)	Reentry of Deported Alien Previously Convicted of Aggravated Felony, 8 U.S.C. Sec. 1326(b)(2)	07/18/2004	

The defendant is sentenced as specified in pages 2 through 5 of this judgment. The sentence is imposed under the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count

☐ Count dismissed on the motion of the United States

IT IS FURTHER ORDERED that the defendant must notify the United States attorney for this district

within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

	5/25/2005
County of Residence	Date of Imposition of Judgment
	/s/ **William P. Johnson**
	Signature of Judge
	Honorable William P. Johnson United States District Judge
	Name and Title of Judge
	5/27/2005
	Date Signed

IMPRISONMENT

The defendant is committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **57 months**.

The Court recommends that the Immigration and Naturalization Service begin removal proceedings during service of sentence.

☒ The court makes these recommendations to the Bureau of Prisons:

The Court recommends a Bureau of Prisons facility in California, were eligible.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant must surrender to the United States marshal for this district:
  ☐ at on
  ☐ as notified by the United States Marshal.

☐ The defendant must surrender for service of sentence at the institution designated by the Bureau of Prisons:
  ☐ before 2 p.m. on
  ☐ as notified by the United States Marshal.
  ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment by:

Defendant delivered on _____ to _____
at _____, with a Certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **2 years unsupervised.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. The defendant shall not commit another federal, state or local crime. The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant possesses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm or destructive device. (Check, if applicable)

☒ The defendant will submit to DNA collection in compliance with statutory requirements while incarcerated in the Bureau of Prisons, or at the direction of the United States Probation Office. (Check, if applicable)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payment set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall obtain and maintain full time, legitimate employment, or attend a vocational or academic training program throughout the term of supervised release as directed by the probation officer;

6) the defendant shall notify the probation officer at ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

SPECIAL CONDITIONS OF SUPERVISION

The defendant must not reenter the United States without legal authorization.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments.

☐ The Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

Totals:	**Assessment**	**Fine**	**Restitution**
	$100.00	**$0.00**	**$0.00**

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

A ☒ In full immediately; or

B ☐ $ immediately, balance due (see special instructions regarding payment of criminal monetary penalties).

Special instructions regarding the payment of criminal monetary penalties: Criminal monetary penalties are to be made payable by cashier's check, bank or postal money order to the U.S. District Court Clerk, 333 Lomas Blvd. NW, Albuquerque, New Mexico 87102 unless otherwise noted by the court. Payments must include defendant's name, current address, case number and type of payment.

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as

directed by the court, the probation officer, or the United States attorney.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff, v. JORGE HERNANDEZ-CASTILLO, Defendant.	Criminal Case No. 04-2210 Albuquerque, New Mexico May 25, 2005 9:00 a.m.

TRANSCRIPT OF SENTENCING

Before the Honorable William P. Johnson
United States District Judge

APPEARANCES:

For the Plaintiff:	Reeve Swainston, Esq. P. O. Box 607 Albuquerque, NM 87103
For the Defendant:	James P. Baiamonte, Esq. 900 Lomas Blvd., NW Albuquerque, NM 87102
For. U.S. Probation:	Virvian Yazzie 333 Lomas Blvd., NW, Ste. 170 Albuquerque, NM 87102
Interpreter (Spanish):	Laura Lynch 333 Lomas Blvd., NW, Ste. 270 Albuquerque, NM 87102
Court Reporter:	Thomas L. Garrett 333 Lomas Blvd., NW, Ste. 610 Albuquerque, NM 87102

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

[2] CONTENTS

SENTENCING
Argument by Mr. Baiamonte 3
Response by Mr. Swainston 6
Statement by the Defendant 8
Findings/Sentence Imposed 8
Reporter's Certificate 14

[3] (In session at 9:17 a.m.)

THE COURT: All right. Next, United States versus Jorge Hernandez-Castillo, 04CR2210.

MR. REEVE SWAINSTON: Reeve Swainston for the United States.

MR. JAMES BAIAMONTE: Good morning, Your Honor. Jim Baiamonte representing Jorge Hernandez-Castillo, who appears before the Court in custody.

THE COURT: Now, Mr. Baiamonte, I noted – I'm assuming you have discussed this Presentence Report at length with the defendant because you filed objections; is that correct?

MR. BAIAMONTE: That's correct, Your Honor.

THE COURT: All right. So I'll go ahead and let you argue the issues that you raised in your sentencing memorandum.

MR. BAIAMONTE: Thank you, Your Honor. Your Honor, it's my pleasure to report for the Court that

rarely do I have a client of Mr. Jorge Castillo's caliber. He's been a pleasure, to represent and a pleasure to work with.

As outlined in my sentencing memorandum, Your Honor, I'm asking the Court for some extraordinary relief here. It seems that, upon closer examination of the facts and circumstances surrounding Mr. Hernandez-Castillo's life; specifically, the 1998 California conviction – we're having technical difficulties, Your Honor.

It's okay?

THE DEFENDANT: (In English) Yeah.

MR. BAIAMONTE: The California conviction for what was then called statutory rape perhaps – perhaps should not be viewed through that prism, and I think its telling to note the California authorities had a mistake on Mr. Hernandez-Castillo's date of birth, listing him as born in 1976, when actually, he was born in 1978. And –

THE COURT: But doesn't that put him at – that still puts him over age 18.

MR. BAIAMONTE: Yes, sir.

THE COURT: Okay.

MR. BAIAMONTE: But I just point it out to the Court because I think there is a significant difference between an 18-year-old man having sex with a 15-year-old girl as opposed to a 20-year-old man having sex. I'm informed that this was a live-in relationship with Ana Mejia, the mother of his child. They resided all in the house of Ana Mejia's parents.

I'm also informed – and I think this is borne out the Presentence Report – that my client continues to have

contact not only with this woman, who's now in her 20s, but also with their daughter. And as I outlined in my sentencing memorandum, it seems unlikely that the mother of the child would allow that to occur if she truly felt aggrieved, even though, at the time, I'm well aware that she's incapable of [5] consent. She's certainly capable of withholding visitation to the child's father if she so chose.

My client's been incarcerated for about ten months, Your Honor. I think the guideline range places this sentence somewhere between a 57- and 71-month range, and I think that probably is appropriate if one just looks at the first blush, you know, criminal sexual penetration of a minor and illegal reentry. It does sound like a 57- to 71-month sentence probably would be fair, just, and reasonable.

But I think, given the totality of the circumstances, that what we have here was a consensual relationship, and I say that cognizant of the fact that Ana Mejia was a minor. And as much or not as much as a person in that situation can consent, it's not really, to my mind, a violent offense in the classic terms, and therefore, I'm asking the Court to award my client a sentence of time served for the ten months he's been incarcerated.

I have been in contact with my client's family, and they call quite regularly. He's married, as evidenced by the attached marriage certificate and the sentencing memorandum. His wife is an American citizen. She calls weekly. The stress that this has created to her has been enormous. She has attempted suicide, and it's been enormously detrimental to not only her health but also the rest of the family.

My client's finally realizing the significance of [6] coming back to the United States. It's not in his best interest or his family's best interests. He's been informed that the cost of coming back into the United States is just going to continue to go up and up, and he can be looking at an enormously lengthy prison sentence in a federal prison if he should come back.

I believe my client wishes to address the Court, and in a final remark, I would like to ask the Court, should the Court adjudge prison time, my client has asked me to ask the Court to send – to make the recommendation that my client serve his prison time in a California prison.

THE COURT: Let me – let's hear from the government, and then I'll let you respond and then the defendant.

MR. BAIAMONTE: Yes, sir.

MR. SWAINSTON: Your Honor, with the exception of just a couple of things I would like to point out in Mr. Cairns' sentencing memorandum and his response, I'll simply rest on the pleadings. It indicates, first of all, that this is a conviction that was a felony because it was punishable by imprisonment greater than one year, and it was an aggravated felony because it was a crime of violence.

I don't think that that's contradicted, and in this case, it was a crime of violence because of the technical issue that we have in the law in this country, as adopted by the California statutes, that a minor simply cannot consent to [7] sexual intercourse.

So for the remainder of the argument, I would just refer the Court's attention to the legal analysis that AUSA

Cairns put together in his response in the government's sentencing memorandum. It is a request for a 16-level reduction. That certainly is extraordinary, but I'll just leave it at that.

THE COURT: Let me – he is – and maybe this was just a mistake in the memo, but I looked at, on Page 1, it says he's in criminal history category I. Was there – in Mr. Cairns' memo. The Presentence Report identified it as criminal history category IV; is that correct?

MS. VIRVIAN YAZZIE: Yes, it is four.

MR. SWAINSTON: If Mr. Cairns did say it was a category I, that's obviously a mistake.

THE COURT: Okay. As far as Mr. Baiamonte, the criminal history, as far as what the points totaled up, the way the Probation Office calculated that, you didn't disagree with that, did you?

MR. BAIAMONTE: I think the Probation Office is correct, Your Honor.

THE COURT: Okay. All right. Then Mr. Baiamonte, I'll let you say anything further and then let the defendant speak.

MR. BAIAMONTE: I have nothing to add, but I believe [8] my client would like to address the Court.

THE DEPENDANT: (Through the Interpreter) I would like to ask you – I know I reentered this country, and I know that was bad to do, to reenter the country. I never stopped to think what would happen if I had to – if I reentered the country.

I know I have a felony file, but I haven't raped anybody because her mother and everybody was in agreement that I would be with her. And I didn't know it was a crime to be with a minor in this country, and I am paying very much for this.

I would like for you to give me the lesser amount of time so I can go back to my country and be with my wife, and its all I can ask you, please. My wife tried to kill herself. She's been in the hospital. She depends of me, and she has a daughter that's not my daughter, but I support her.

And I've always worked in this country. I have not done drugs. I have never stolen. I have never done anything wrong in this country. This is the only problem I have.

I please beg you that you give me the lesser sentence. I will never come back to this country till I have a permit. That would be all.

THE COURT: All right. In looking at this Presentence Report, in Paragraph 19, referencing the California case, it was Count III was charged with sex with a minor three [9] years younger, which is a felony, which I think that offense is more commonly known as statutory rape. On June the 3rd, 1998, the defendant pled guilty. He was represented by counsel, and it appears that Counts I and II were dismissed as part of the Plea Agreement.

Now, it also references the defendant contends that the victim's parents approved of the relationship; however, the Presentence Report states that the victim's parents sought to bring the charges against the defendant. So that tells me that, somewhere along the lines, the victim's

parents didn't approve of the relationship, and that's why virtually every state in the nation has some sort of law that basically would be classified as statutory rape.

Now, the issues that really have been raised today regarding the age and the consensual nature of the relationship, what's been alleged, my reaction is that there should have been – it more properly raised to the California court. I mean, the bottom line is this defendant has a conviction for an offense that basically would be called statutory rape. He was represented by counsel in California, and he pled guilty to it. And then as a result of that, he was deported and made the unwise choice of then coming back into the United States, and that's why he finds himself in the situation where he is now.

But in terms of looking at that California offense, [10] its a felony offense. A felony offense means any federal, state, or local offense punishable by imprisonment for a term exceeding one year, so there's no question that this was a felony offense. I mean, the California court characterized it as a felony, and so it's a purpose – it's a felony for purposes of the sentencing guidelines.

And then in terms of falling into the category of a crime of violence, again, under this California law as well as the other states' laws that I'm familiar with that fall into the category of statutory rape, basically a minor under all – virtually all the statutory rape laws that I'm aware of, the minor victim cannot consent as a matter of law to sexual intercourse with an adult.

Now, I'm required to look only into the elements of the statute in determining whether a crime is a crime of violence, and as the sentencing guideline definition, statutory rape is a crime of violence under U.S. Sentencing

Guideline Section 2L1.2, Application Note B, little Section 3. Therefore, the Probation office properly calculated a 16-level increase pursuant to U.S. Sentencing Guideline Section 2L1.2(b)(1)(A), little 2.

So the Presentence Report – that is, the guideline, the offense level 21, criminal history category IV, is the defendant's proper guideline sentence. So then the question is whether this sentence is a reasonable sentence, taking into [11] account the sentencing factors of 18 U.S.C. 3553(a).

And in looking at those factors, including the nature and circumstances of the offense and the history and characteristics of the defendant, also the seriousness of the offense, the requirement to promote respect for the law and to provide just punishment for the offense – that is, of illegally reentering the United States – and to afford adequate deterrence to this type of criminal conduct, I cannot make the finding that the guideline sentence in this case is a unreasonable sentence, taking into account the sentencing factors of 18 U.S.C. 3553(a).

I'll note that I have held in other ca – just most recently, involving a Colorado statute, that that 16-level increase for sex with a minor was appropriately calculated under – looking at the Colorado statute. And I'm aware that other judges in this district in similar cases have also held that the 16-level increase under the sentencing guidelines for a crime that falls within the category of statutory rape or some sort of sexual contact with a minor, that that 16-level increase is appropriate.

So having considered the defendant's Presentence Report's factual findings and considered the sentencing guidelines as well as the sentencing factors of 18 U.S.C.

3553(a), I find that the guideline imprisonment range of 57 to 71 months is a reasonable sentence.

[12] Therefore, as to the redacted superseding indictment in this case, the defendant will be committed to the custody of the Bureau of Prisons for a term of 57 months and will be placed on supervised release for a term of two years following service of the sentence. Mandatory and standard conditions will apply.

The term of supervised release will be unsupervised however, the following condition – special condition the defendant – will be in force: The defendant shall not reenter the United States unless he has proper written legal authorization from the appropriate U.S. governmental authorities.

And I'll strongly – I realize this is a lengthy sentence, and I will strongly recommend and encourage the defendant not to reenter the United States. Otherwise, he's looking at a – he would be looking at a prison sentence that is much longer than the one he's receiving today.

I'll recommend the Immigration and Naturalization Service begin removal proceedings during service of the sentence. Based on the defendant's lack of financial resources, no fine will be imposed; however, I am required to impose a special penalty assessment of $100, which is due immediately. I will recommend BOP incarcerate the defendant at a California facility if the defendant is eligible.

And finally, I must advise the defendant that, within [13] ten days of the entry of the judgment, he has the right to appeal the final sentence imposed in this matter. He

also has the right to apply for leave to appeal in forma pauperis if he's unable to pay for the cost of an appeal.

All right. Thank you.

I'm going to take a break. I need to – it'll probably be about 10 to 15. I need to finish reading some of the cases that were cited by counsel on the Gwathney case in the sentencing memorandum, so I'll be back in about 10, 15.

(Recess at 9:38 a.m.)

[14] REPORTER'S CERTIFICATE

I, THOMAS L. GARRETT, Official Court Reporter for the United States District Court, District of New Mexico, hereby certify that I reported the proceedings in 04CR2210 and that the pages contained herein are a true and correct transcript of the proceedings.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case and that I have no interest whatsoever in the final disposition of this case in any court.

WITNESS MY HAND this 13th day of July 2005.

/s/ Thomas L. Garrett
Thomas L. Garrett, CCR
Official Court Reporter
CCR No. 255

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE PRINTED: 06/23/98

CASE NO. VA047636

THE PEOPLE OF THE STATE OF CALIFORNIA

VS.

DEFENDANT 01: JORGE CASTILLO HERNANDEZ

INFORMATION FILED ON 04/28/98.

COUNT 01: 261.5(D) PC FEL –
SEX WITH MINOR UNDER 16 YRS.
COUNT 02: 288(A) PC FEL –
LEWD ACTS WITH CHILD UNDER 14.
COUNT 03: 261.5(C) PC FEL –
SEXUAL INTERCOURSE W/ MINOR.

ON 06/23/98 AT 830 AM IN L.A. SUPERIOR SOUTH-EAST DEPT SEN

CASE CALLED FOR P & S/DISPO REMAINING COUNTS

PARTIES: MICHAEL A. COWELL (JUDGE)
RUSTY PINKNEY (CLERK)
WENDY WOOD (REP)
ROY W. SAUKKOLA (DDA)

DEFENDANT IS PRESENT IN COURT, AND REPRESENTED BY ARTHUR GOLDBERG PRIVATE COUNSEL

DEFENDANT WAIVES ARRAIGNMENT FOR JUDGMENT AND STATES THERE IS NO LEGAL CAUSE WHY SENTENCE SHOULD NOT BE PRONOUNCED. THE COURT ORDERED THE FOLLOWING JUDGMENT:

AS TO COUNT (03):

IMPOSITION OF SENTENCE SUSPENDED

DEFENDANT PLACED ON FORMAL PROBATION

FOR A PERIOD OF 004 YEARS UNDER THE FOLLOWING TERMS AND CONDITIONS:

SERVE 157 DAYS IN LOS ANGELES COUNTY JAIL

DEFENDANT GIVEN TOTAL CREDIT FOR 157 DAYS IN CUSTODY 105 DAYS ACTUAL CUSTODY AND 52 DAYS GOOD TIME/WORK TIME

IN ADDITION:

– THE DEFENDANT IS TO PAY A RESTITUTION FINE PURSUANT TO SECTION 1202.4(B) PENAL CODE IN THE AMOUNT OF $200.00.

– COOPERATE WITH THE PROBATION OFFICER IN A PLAN FOR PSYCHOLOGICAL COUNSELING THAT SHOULD ALSO INCLUDE DOMESTIC VIOLENCE COUNSELING.

– SEEK AND MAINTAIN TRAINING, SCHOOLING OR EMPLOYMENT AS APPROVED BY THE PROBATION OFFICER.

– MAINTAIN RESIDENCE AS APPROVED BY THE PROBATION OFFICER.

– SUPPORT DEPENDENTS AS DIRECTED BY THE PROBATION OFFICER.

– OBEY ALL LAWS AND ORDERS OF THE COURT.

– OBEY ALL RULES AND REGULATIONS OF THE PROBATION DEPARTMENT.

– DEFENDANT TO REPORT TO THE PROBATION OFFICER WITHIN 48 HOURS TO SOUTH CENTRAL AREA OFFICE, AFTER RELEASE FROM CUSTODY.

– DEFENDANT ACKNOWLEDGES TO THE COURT THAT THE DEFENDANT UNDERSTANDS AND ACCEPTS ALL THE PROBATION CONDITIONS, AND DEFENDANT AGREES TO ABIDE BY SAME.

RELEASE #413587 IS WRITTEN.

COUNT (03): DISPOSITION: CONVICTED

REMAINING COUNTS DISMISSED.

COUNT (01): DISMISSED DUE TO PLEA NEGOTIATION

COUNT (02): DISMISSED DUE TO PLEA NEGOTIATION

DMV ABSTRACT NOT REQUIRED

NEXT SCHEDULED EVENT:
PROCEEDINGS TERMINATED

CUSTODY STATUS: DEFENDANT RELEASED

CUSTODY STATUS: ON PROBATION

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE PRINTED: 06/03/98

CASE NO. VA047636

THE PEOPLE OF THE STATE OF CALIFORNIA

VS

DEFENDANT 01: JORGE CASTILLO HERNANDEZ

INFORMATION FILED ON 04/28/98.

COUNT 01: 261.5(D) PC FEL –
SEX WITH MINOR UNDER 16 YRS.

COUNT 02: 288(A) PC FEL –
LEWD ACTS WITH CHILD UNDER 14.
COUNT 03: 261.5(C) PC FEL –
SEXUAL INTERCOURSE W/ MINOR.

ON 06/03198 AT 830 AM IN L.A. SUPERIOR SOUTH-EAST DEPT SEN

CASE CALLED FOR PRETRIAL CONFERENCE

PARTIES: MICHAEL A. COWELL (JUDGE)
RUSTY PINKNEY (CLERK)
DEBORAH COUWENBERG (REP)
ROY W. SAUKKOLA (DDA)

DEFENDANT IS PRESENT IN COURT, AND REPRESENTED BY ARTHUR GOLDBERG PRIVATE COUNSEL

MARTHA HASSAN, OFFICIAL COURT INTERPRETER, PRESENT AS SPANISH INTERPRETER. OATH ON FILE.

DEFENDANT ADVISED OF AND PERSONALLY AND EXPLICITLY WAIVES THE FOLLOWING RIGHTS:

WRITTEN ADVISEMENT OF RIGHTS AND WAIVERS FILED, INCORPORATED BY REFERENCE HEREIN

TRIAL BY COURT AND TRIAL BY JURY

CONFRONTATION AND CROSS-EXAMINATION OF WITNESSES;

SUBPOENA OF WITNESSES INTO COURT TO TESTIFY IN YOUR DEFENSE;

AGAINST SELF-INCRIMINATION;

DEFENDANT ADVISED OF THE FOLLOWING:

THE NATURE OF THE CHARGES AGAINST HIM, THE ELEMENT OF THE OFFENSE IN THE INFORMATION AND POSSIBLE DEFENSES TO SUCH CHARGES:

THE POSSIBLE CONSEQUENCES OF A PLEA OF GUILTY OR NOLO CONTENDERE, INCLUDING THE MAXIMUM PENALTY AND ADMINISTRATIVE SANCTIONS AND THE POSSIBLE LEGAL EFFECTS AND MAXIMUM PENALTIES INCIDENT TO SUBSEQUENT CONVICTIONS FOR THE SAME OR SIMILAR OFFENSES;

THE EFFECTS OF PROBATION;

IF YOU ARE NOT A CITIZEN, YOU ARE HEREBY ADVISED THAT A CONVICTION OF THE OFFENSE FOR WHICH YOU HAVE BEEN CHARGED MAY HAVE THE CONSEQUENCES OF DEPORTATION, EXCLUSION FROM ADMISSION TO THE UNITED STATES, OR DENIAL OF NATURALIZATION PURSUANT TO THE LAWS OF THE UNITED STATES;

COURT FINDS THAT EACH SUCH WAIVER IS KNOWINGLY, UNDERSTANDINGLY, AND EXPLICITLY MADE;

UPON MOTION OF DEFENDANT, PLEA TO COUNT 03 VACATED AND SET ASIDE, AND NEW AND DIFFERENT PLEA OF GUILTY ENTERED.

COUNT (03): DISPOSITION: CONVICTED

THE COURT ORDERS A PROBATION REPORT: ORIGINAL REFERRAL. COURT ORDERS AND FINDINGS:

-THE COURT ORDERS THE DEFENDANT TO APPEAR ON THE NEXT COURT DATE.

COURT FINDS THAT THERE IS A FACTUAL BASIS FOR DEFENDANT'S PLEA, AND COURT ACCEPTS PLEA.

TRIAL DATE OF 06/25/98 IS ADVANCED AND VACATED.

NEXT SCHEDULED EVENT:

06/23/98 830 AM P & S/DISPO REMAINING COUNTS DIST L.A. SUPERIOR SOUTHEAST DEPT SEN

CUSTODY STATUS: DEFENDANT REMANDED

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE PRINTED: 05/20/98

CASE NO. VA047636

THE PEOPLE OF THE STATE OF CALIFORNIA

VS.

DEFENDANT 01: JORGE CASTILLO HERNANDEZ

INFORMATION FILED ON 04/28/98.

COUNT 01: 261.5(D) PC FEL –
SEX WITH MINOR UNDER 16 YRS.
COUNT 02: 288(A) PC FEL –
LEWD ACTS WITH CHILD UNDER 14.
COUNT 03: 261.5(C) PC FEL –
SEXUAL INTERCOURSE W/ MINOR.

ON 05/20/98 AT 830 AM IN L.A. SUPERIOR SOUTHEAST DEPT SEN

CASE CALLED FOR PRETRIAL CONFERENCE

PARTIES: MICHAEL A. COWELL (JUDGE)
MONICA VILLARRUEL (CLERK)
DEBORAH COUWENBERG (REP)
ROY W. SAUKKOLA (DDA)

DEFENDANT IS PRESENT IN COURT, AND REPRESENTED BY ARTHUR GOLDBERG PRIVATE COUNSEL

ANA MARIA HALL, OFFICIAL COURT INTERPRETER, PRESENT AS SPANISH INTERPRETER.

OATH ON FILE.

BAIL SET AT $30,000

DEFENSE MOTION TO REDUCE BAIL IS HEARD AND ARGUED. COURT CONSIDERS O.R. REPORT AND GRANTS MOTION. BAIL IS REDUCED TO $30,000.00 JURY TRIAL DATE OF 6-25-98 REMAINS AS 58 OF 60 DAYS

DEFENDANT IS ORDERED TO RETURN ON 6-25-98

NEXT SCHEDULED EVENT:
JURY TRIAL

CUSTODY STATUS: DEFENDANT REMANDED

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE PRINTED: 04/28/98

CASE NO. VA047636

THE PEOPLE OF THE STATE OF CALIFORNIA

VS.

DEFENDANT 01: JORGE CASTILLO HERNANDEZ

INFORMATION FILED ON 04/28/98.

COUNT 01: 261.5(D) PC FEL –
SEX WITH MINOR UNDER 16 YRS.
COUNT 02: 288(A) PC FEL –
LEWD ACTS WITH CHILD UNDER 14.
COUNT 03: 261.5(C) PC FEL –
SEXUAL INTERCOURSE W/ MINOR.

ON 04/28/98 AT 830 AM IN L.A. SUPERIOR SOUTHEAST DEPT SEN

CASE CALLED FOR ARRAIGNMENT

PARTIES: MICHAEL A. COWELL (JUDGE)
RUSTY PINKNEY (CLERK)
KATHY SHEPHERD (REP)
ROY W. SAUKKOLA (DDA)

PUBLIC DEFENDER APPOINTED.
ROBERT NOGUCHI – P.D.

DEFENDANT IS PRESENT IN COURT, AND REPRESENTED BY ROBERT NOGUCHI DEPUTY PUBLIC DEFENDER

F. VALENCIA. OFFICIAL COURT INTERPRETER, PRESENT AS SPANISH INTERPRETER.

OATH ON FILE.

INFORMATION FILED AND THE DEFENDANT IS ARRAIGNED.

DEFENDANT PLEADS NOT GUILTY TO COUNT 01, 261.5(D) PC – SEX WITH MINOR UNDER 16 YRS.

DEFENDANT PLEADS NOT GUILTY TO COUNT 02, 288(A) PC – LEWD ACTS WITH CHILD UNDER 14.

DEFENDANT PLEADS NOT GUILTY TO COUNT 03, 261.5(C) PC – SEXUAL INTERCOURSE W/ MINOR.

COURT ORDERS AND FINDINGS:

– THE COURT ORDERS THE DEFENDANT TO APPEAR ON THE NEXT COURT DATE.

NEXT SCHEDULED EVENT:
05/20/98 830 AM PRETRIAL CONFERENCE
DIST L.A. SUPERIOR SOUTHEAST DEPT SEN

NEXT SCHEDULED EVENT 2:
06/25/98 830 AM JURY TRIAL
DIST L.A. SUPERIOR SOUTHEAST DEPT SEN
DAY 58 OF 60

CUSTODY STATUS: DEFENDANT REMANDED

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JORGE HERNANDEZ-CASTILLO, Defendant-Appellant.	No. 05-2157

ORDER

Filed August 2, 2006

Before O'BRIEN, McWILLIAMS, and McCONNELL, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER,
Clerk

by: /s/ [Illegible]
Deputy Clerk

FILED
NOV 27 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-432

In the Supreme Court of the United States

JORGE HERNANDEZ-CASTILLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
CLAIRE J. EVANS
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's prior felony conviction under California law for sexual intercourse with a minor three years younger was a felony conviction for a "crime of violence" for purposes of Section 2L1.2(b)(1)(A)(ii) of the Sentencing Guidelines, which provides for a 16-level enhancement for defendants convicted of illegally reentering the United States following deportation after having been convicted of a crime of violence.

2. Whether the court of appeals erred in not reviewing petitioner's sentence for reasonableness when his attorney did not challenge the reasonableness of the sentence on appeal.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 11

TABLE OF AUTHORITIES

Cases:

Anderson, In re, 447 P.2d 117 (Cal. 1968) 9
Blakely v. *Washington*, 542 U.S. 296 (2004) 10
Braxton v. *United States*, 500 U.S. 344 (1991) 6
Claiborne v. *United States*, cert. granted, No. 06-5618 (Nov. 3, 2006) 10
Ewing v. *California*, 538 U.S. 11 (2003) 8, 9
Krastev v. *INS*, 292 F.3d 1268 (10th Cir. 2002) 9
Pasquantino v. *United States*, 544 U.S. 349 (2005) 10
Rita v. *United States*, cert. granted, No. 06-5754 (Nov. 3, 2006) 10
Stinson v. *United States*, 508 U.S. 36 (1993) 6
Tulengkey v. *Gonzales*, 425 F.3d 1277 (10th Cir. 2005) ... 9
United States v. *Alvarado-Hernandez*, 465 F.3d 188 (5th Cir. 2006) 7, 8
United States v. *Booker*, 543 U.S. 220 (2005) 3, 5, 10
United States v. *Granbois*, 376 F.3d 993 (9th Cir.), cert. denied, 543 U.S. 1014 (2004) 7

Cases—Continued: Page

United States v. *Houston*, 364 F.3d 243 (5th Cir. 2004) 7
United States v. *Levy*, 416 F.3d 1273 (11th Cir.), cert. denied, 126 S. Ct. 643 (2005) 10
United States v. *Munguia-Sanchez*, 365 F.3d 877 (10th Cir.), cert. denied, 543 U.S. 896 (2004) 4
United States v. *Ortiz-Delgado*, 451 F.3d 752 (11th Cir. 2006) 7
United States v. *Smith*, 416 F.3d 1350 (11th Cir.), cert. denied, 126 S. Ct. 784 (2005) 10

Statutes, regulations and rules:

8 U.S.C. 1326(a)(1) 1
8 U.S.C. 1326(a)(2) 1
8 U.S.C. 1326(b)(2) 1
28 U.S.C. 994(*o*) 6
Cal. Penal Code § 261.5(c) (West 1999) 2
United States Sentencing Guidelines:
§ 2K.2.1, comment. (n.5) (2001) 7
§ 2L1.2(a) 2
§ 2L1.2(b)(1)(A)(ii) 2, 5, 7, 8
§ 2L1.2, comment. (n.1(B)(iii)) 3, 5, 6
§ 3E1.1 2
§ 4A1.1(b) 2
§ 4A1.1(d) 2
§ 4A1.1(e) 2

Regulations and rules—Continued: Page

§ 4B.1.2, comment. (n.1) 7
App. C. amend. 658 6
Fed. R. App. P. 28(a)(5) 9
10th Cir. R. 28.2(c)(2) 9

In the Supreme Court of the United States

No. 06-432

JORGE HERNANDEZ-CASTILLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 449 F.3d 1127.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2006. A petition for rehearing was denied on August 2, 2006 (Pet. App. 39). The petition for a writ of certiorari was filed on September 22, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of New Mexico, petitioner was convicted of illegally reentering the United States after deportation following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a)(1), (2) and (b)(2).

He was sentenced to 57 months of imprisonment. Pet. App. 11-18. The court of appeals affirmed. *Id.* at 1-10.

1. On July 18, 2004, petitioner, a Mexican national, was stopped at a border patrol checkpoint north of Las Cruces, New Mexico, and admitted that he had entered the United States illegally the previous day. Pet. App. 2-3; PSR ¶ 4. An immigration check revealed that petitioner had been deported from the United States on July 3, 1998, following a June 23, 1998, conviction for sexual intercourse with a minor more than three years younger, in violation of Cal. Penal Code § 261.5(c) (West 1999). Pet. App. 2; PSR ¶ 5. Petitioner had been 18 years old at that time and had been involved in a consensual sexual relationship with a 14-year-old female, who became pregnant. Pet. App. 2.

2. Petitioner pleaded guilty to illegally reentering the United States after deportation following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a)(1), (2) and (b)(2). In calculating petitioner's offense level, the Probation Office began with a base offense level of eight, added 16 levels because petitioner had been previously deported after a conviction for a felony that is a crime of violence, and subtracted three levels for acceptance of responsibility. That calculation resulted in a total offense level of 21, which, when combined with a criminal history category of IV, yielded a Sentencing Guidelines range of 57 to 71 months of imprisonment. PSR ¶¶ 7-23; Pet. App. 3; see Sentencing Guidelines §§ 2L1.2(a) and (b)(1)(A)(ii), 3E1.1, 4A1.1(b), (d) and (e).

Petitioner objected to the "crime of violence" enhancement, arguing that his conviction for sexual intercourse with a minor more than three years younger should be treated as a misdemeanor because his rela-

tionship with the minor was consensual. Pet. App. 22; PSR Addendum. The district court held that the enhancement applied because the offense of "sex with a minor three years younger, which is a felony, which * * * is more commonly known as statutory rape," is listed as a "crime of violence" in the commentary to Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)). Pet. App. 25-27.

On May 25, 2005, the district court, having "tak[en] into account the sentencing factors of 18 U.S.C. 3553(a) * * * including the nature and circumstances of the offense and the history and characteristics of the defendant, also the seriousness of the offense, the requirement to promote respect for the law and to provide just punishment for the offense—that is, of illegally reentering the United States—and to afford adequate deterrence to this type of criminal conduct," concluded that the "guideline imprisonment range of 57 to 71 months is a reasonable sentence." Pet. App. 27-28. The district court imposed a sentence of 57 months of imprisonment. *Id.* at 28.

3. On appeal, petitioner argued that the district court erred in holding that his statutory rape conviction qualified categorically as a felony and "crime of violence" under the Sentencing Guidelines, because the statute under which he was prosecuted for the offense "permit[ted] the classification of the offense to be a misdemeanor or a felony" and he was sentenced under that statute "to merely 157 days in the Los Angeles County jail," which "was clearly a misdemeanor sentence." Pet. C.A. Br. 9-12. He further argued that any facts about the prior conviction, apart from the fact of conviction itself, should be tried to a jury. *Id.* at 6-9. Although he cited *United States* v. *Booker*, 543 U.S. 220 (2005), for

other purposes, see Pet. C.A. Br. 6, 7, 9, 13, petitioner did not raise a challenge to the reasonableness of his sentence.

On June 6, 2006, the court of appeals affirmed, concluding that "the district court did not err * * * by classifying [petitioner]'s prior California conviction as both a felony and a crime of violence." Pet. App. 8. The court of appeals explained that, while it was true that petitioner was convicted for a crime that was "punishable either as a felony or a misdemeanor," it was clear under California law that petitioner's offense was properly classified as a felony. *Id.* at 5-7. The court of appeals further determined that, because the conviction was one for "statutory rape" under California law, and because statutory rape is included in the commentary to Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) as an offense that is "always classified as [a] 'crime[] of violence,'" petitioner's "conviction was for a crime of violence irrespective of whether his relationship with [the victim] was consensual." Pet. App. 7-8 (quoting *United States* v. *Munguia-Sanchez*, 365 F.3d 877, 881 (10th Cir.), cert. denied, 543 U.S. 896 (2004)).

Because petitioner's counsel did not contest "the reasonableness of the resulting sentence," the court affirmed the sentence. Pet. App. 8. The court "fe[lt] compelled to comment, however," that this may be "the obvious case where an exercise of *Booker* discretion could mitigate a sentence that does not fit the particular facts of the case." *Id.* at 8-9. "The sentence results from a sixteen-level enhancement on account of a consensual sexual relationship [petitioner] had with a younger girl many years ago, with parental consent, when both were teenagers." *Id.* at 8. The court explained that, "[u]nder the Sentencing Guidelines, this prior act, a statutory

rape, is classified as a violent felony, leading to a 16-point enhancement, which translates into about four additional years in federal prison," when, "[i]n reality, [petitioner] committed no violence and he was punished at the level of a misdemeanor." *Ibid.* "[B]ut unfortunately for [petitioner], his lawyer has not challenged the reasonableness of the sentence." *Id.* at 9.

ARGUMENT

Petitioner contends (Pet. 16-18) that the court of appeals erred in finding that his conviction for statutory rape was a "crime of violence" and (Pet. 10-16) in failing to consider his sentence for reasonableness pursuant to *United States* v. *Booker*, 543 U.S. 220 (2005). The former holding is correct and does not conflict with the decision of any other court of appeals, and the latter issue was not raised by petitioner in the court of appeals. Thus, there is no warrant for further review by this Court.

1. Petitioner contends (Pet. 16-18) that the court of appeals erred in holding that his conviction for statutory rape was a "crime of violence" that triggered the 16-level enhancement of Sentencing Guidelines § 2L1.2(b)(1)(A)(ii). That claim lacks merit and does not warrant further review.

a. Petitioner first contends (Pet. 16-17) that statutory rape should not be classified as a "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii)[1] because statutory rape does not always involve the use of force. Petitioner's claim is contradicted by the ex-

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[1] Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) provides: "If the defendant previously was deported, or unlawfully remained in the United States, after * * * a conviction for a felony that is * * * a crime of violence * * * increase by 16 levels."

press language of the Sentencing Guidelines which includes "statutory rape" as a "crime of violence." *Id.* § 2L1.2, comment. n.1(B)(iii).[2] The Sentencing Commission's commentary is binding unless it is "plainly erroneous" or "inconsistent" with the Guidelines it interprets. *Stinson* v. *United States*, 508 U.S. 36, 43-47 (1993). The commentary here is therefore binding on the classification of statutory rape as a crime of violence.

A question involving the interpretation of the Sentencing Guidelines normally does not warrant this Court's review, in light of the Sentencing Commission's "statutory duty 'periodically [to] review and revise' the Guidelines." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (quoting 28 U.S.C. 994(*o*)). That general rule carries added force here, because the Sentencing Commission has demonstrated its attention to the specific question posed by the petition. Before petitioner's case, the Sentencing Commission adopted a clarifying amendment that "makes clear that the enumerated offenses [in Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)), which includes 'statutory rape,'] are always classified as 'crimes of violence,' regardless of whether the prior offense expressly has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines App. C amend.

---

[2] Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) states:

> "Crime of violence" means any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, *statutory rape*, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

Ibid. (emphasis added).

658. Before the amendment, there was some "confusion over whether the specified offenses listed in th[e prior] definition, particularly sexual abuse of a minor and residential burglary, also had to include as an element of the offense 'the use, attempted use, or threatened use of physical force against the person of another.'" *Ibid.* The amendment removed the ambiguity, and at the time of petitioner's illegal reentry and at the time of sentencing it was established that a prior conviction for one of the enumerated offenses, including "statutory rape," warrants the 16-level enhancement, regardless of whether the elements of that crime included the use, attempted use, or threatened use of physical force. See, *e.g. United States* v. *Alvarado-Hernandez*, 465 F.3d 188, 189 (5th Cir. 2006); *United States* v. *Ortiz-Delgado*, 451 F.3d 752, 756-757 (11th Cir. 2006); *United States* v. *Granbois*, 376 F.3d 993, 996 (9th Cir.), cert. denied, 543 U.S. 1014 (2004).

Contrary to petitioner's contention (Pet. 17), there is no "significant Circuit split" regarding the classification of "statutory rape" as a "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii). As petitioner notes, in *United States* v. *Houston*, 364 F.3d 243 (2004), the Fifth Circuit found that statutory rape was not a "crime of violence" under the firearms provision of the Sentencing Guidelines, which adopts the definition of "crime of violence" under the career offender provision of the Guidelines. See *id.* at 246 (discussing Sentencing Guidelines § 2K2.1, comment. (n.5) (2001); *id.* § 4B1.2, comment. (n.1)). The Fifth Circuit has since limited the holding in *Houston* to the Guidelines provisions at issue there, which "did not include statutory rape as an enumerated offense." *Alvarado-Hernandez*, 465 F.3d at 190 n.1. The Fifth Circuit recognizes that, by contrast, "the

provision at issue in this case, § 2L1.2, specifically enumerates statutory rape as a crime of violence." *Ibid.* There is, therefore, no disagreement among the courts of appeals that warrants further review by this Court.

b. Petitioner further contends (Pet. 17-18) that his conviction for statutory rape should not be treated as a felony for purposes of Section 2L1.2(b)(1)(A)(ii) of the Sentencing Guidelines. He asserts that this Court should "revisit the 'categorical' application of the California 'wobbler' rule" and treat his prior felony conviction as though it were a misdemeanor conviction. That argument lacks merit and does not warrant further review.

The "wobbler" rule applies to certain California statutes, such as the one under which petitioner was prosecuted, that allow the court to classify the offense as either a felony or a misdemeanor. Petitioner does not dispute that a plurality of this Court has found that the fact that a felony conviction could have been a misdemeanor conviction under a "wobbler" statute "is of no moment" in determining whether that prior conviction was, in fact, a felony conviction. *Ewing* v. *California*, 538 U.S. 11, 28 (2003) (plurality opinion); Pet. 17-18 (citing *Ewing*). Nor does petitioner dispute that the court of appeals correctly determined that, under California law, his conviction is classified as a felony. Pet. 17-18; Pet. App. 7.

Nonetheless, petitioner argues that his prior felony conviction should be treated as though it had been a misdemeanor conviction under the facts of this case because his sentence for that felony allowed him to "resolve [his] teenage indiscretions through probationary counseling and made him into a responsible father." Pet. 18. While it is true that the purpose of the "wobbler" scheme is to

allow sentencing judges "to downgrade certain felonies" and "impose a misdemeanor sentence in those cases in which the rehabilitation of the convicted defendant either does not require, or would be adversely affected by, incarceration in state prison as a felon," *Ewing*, 538 U.S. at 29 (plurality opinion) (quoting *In re Anderson*, 447 F.2d 117, 152 (Cal. 1968) (Tobriner, J., concurring and dissenting)), the fact that petitioner's prior sentence had that effect "is of no moment" in this case where petitioner's conviction is characterized as a felony under state law, *id.* at 28.

2. Petitioner also contends (Pet. 10-16) that the court of appeals erred when it did not consider his sentence for reasonableness pursuant to *Booker*. Petitioner's argument is mistaken.

Although petitioner argues that there should not be a "presumption of reasonableness" (Pet. 11) for Sentencing Guidelines sentences, the court of appeals did not apply a presumption of reasonableness to petitioner's sentence. Instead, the court of appeals held that it could not consider the reasonableness of petitioner's sentence because petitioner failed to raise the issue. Pet. App. 4, 8, 9. A court of appeals is under no obligation to consider a claim that is not timely raised. See *Tulengkey* v. *Gonzales*, 425 F.3d 1277, 1279 n.1 (10th Cir. 2005) ("Issues not raised on appeal are deemed to be waived") (quoting *Krastev* v. *INS*, 292 F.3d 1268, 1280 (10th Cir. 2002)). Claims are timely raised if they are contained in the appellant's opening brief in the court of appeals. Fed. R. App. P. 28(a)(5). The Tenth Circuit also requires that the opening brief include a citation to "the precise reference in the record where the issue was raised and ruled on" in the district court. 10th Cir. R. 28.2(C)(2).

The longstanding principle that the court of appeals may decline to decide an issue that has not been raised by the appellant applies to *Booker* claims. *Booker* itself indicated that it "expect[ed] reviewing courts to apply ordinary prudential doctrines" in determining whether relief is warranted, 543 U.S. at 268. One such "prudential doctrine" is the abandonment of a claim by failing to raise it in a timely manner. See, *e.g.*, *Pasquantino* v. *United States*, 544 U.S. 349, 372 n.14 (2005) (declining to consider sentence in light of *Blakely* v. *Washington*, 542 U.S. 296 (2004), pursuant to its prudential rule that petitioners need to raise the claim before the court of appeals and in their petition for a writ of certiorari). The court of appeals was therefore entitled to exercise discretion not to rule on a *Booker* claim that petitioner did not present. As the Eleventh Circuit has explained, "[i]t seems relatively obvious that if the Supreme Court may apply its prudential rules to foreclose a defendant's untimely *Blakely*, now *Booker*, claim, there is no reason why [courts of appeals] should be powerless to apply [a] prudential rule to foreclose [a] defendant['s] * * * untimely *Blakely*, now *Booker*, claim." *United States* v. *Levy*, 416 F.3d 1273, 1277, cert. denied, 126 S. Ct. 643 (2005); accord *United States* v. *Smith*, 416 F.3d 1350, 1354 (11th Cir.), cert. denied, 126 S. Ct. 784 (2005).

3. On November 3, 2006, this Court granted writs of certiorari in *Claiborne* v. *United States*, No. 06-5618, and *Rita* v. *United States*, No. 06-5754, to address various aspects of the application of reasonableness review under *Booker* in the imposition and appellate review of federal sentences. The petition in this case need not be held pending the disposition of *Claiborne* and *Rita*, however, because petitioner raised no challenge to the rea-

sonableness of his sentence under *Booker* in the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

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In The

Supreme Court of the United States

JORGE HERNANDEZ-CASTILLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF TO THE GOVERNMENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Government misrepresents the first two questions presented in Petitioner's Petition for a Writ of Certiorari. In Questions 1 and 2, Petitioner is not merely second-guessing the definition of a "crime of violence" in Sentencing Guidelines § 2L1.2. Rather, Petitioner is questioning the Tenth Circuit's cavalier presumptions of reasonableness within the Sentencing Guidelines and the chilling effect of the "two-step" review process established by *United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006), a decision entered by the Tenth Circuit Court of Appeals after the briefing in Petitioner's appeal, but nonetheless relied upon by the Tenth Circuit in determining Petitioner's appeal. These questions are important to the present case because the Tenth Circuit Court of Appeals found that the sentence imposed on Petitioner was unreasonable, but refused to rectify the situation because Petitioner did not brief the *Kristl* analysis.

Question No. 3 does raise the categorical approach to "consensual" statutory rape as a crime of violence.

ARGUMENT

In its Brief in Opposition at 7, the Government notes that the Fifth Circuit has recently had second thoughts about Texas' statute on sexual relations with a minor in *United States v. Alvarado-Hernandez*, 465 F.3d 188 (5th Cir. 2006), because of the "common-sense as well as a generic, contemporary definition of statutory rape." *Alvarado-Hernandez*, 465 F.3d at 189-190. The same circuit has also recently held that the Texas offense of sexual assault, on the other hand, does not qualify as a crime of violence because it does not require the use of force. *United States v. Luciano-Rodriguez*, 442 F.3d 320 (5th Cir. 2006). The year 2006 has raised new concerns in Texas about consensual sex.

This same year, the Ninth Circuit, in *Valencia v. Gonzales*, 439 F.3d 1046 (9th Cir. 2006), held that a Californian's unlawful sexual intercourse with a person younger than eighteen was not a crime of violence for purposes of 18 U.S.C. § 16 because the statute did not require actual lack of consent by the minor. An enhancement under Sentencing Guidelines § 2L1.2, however, might be applicable because the 2003 amendments specifically list "statutory rape" as a crime of violence. *Valencia*, 439 F.3d at 1053, *dicta*.

The Ninth Circuit, in *United States v. Lopez-Solis*, 447 F.3d 1201 (9th Cir. 2006), on the other hand, refused to apply the statutory rape designation in Sentencing Guidelines § 2L1.2 to a Tennessee statute proscribing sex with a minor because the 2003 amendments to § 2L1.2 were not in effect at the time of the prior offense in 2002. Petitioner's prior offense occurred in 1998.

The very limitations and confusions concerning "consensual" teenage sex which are presented in the government's Brief in Opposition indicate the need to apply Part II of *Booker v. United States*, 543 U.S. 220 (2005), more liberally in this area of law. Contrary to *Alvarado-Hernandez*, 465 F.3d at 189-190, statutory rape is neither a "contemporary" nor a "generic" concept. The historical analysis of the common law offense of statutory rape concluded that female minors were incompetent to give consent to sexual intercourse, and, therefore, any sexual intercourse with such females was rape, as a matter of law. There is no such thing as "consensual" statutory rape. Modern laws proscribing "unlawful sexual intercourse with persons under eighteen" are an attempt to compromise between protecting minors from sexual abuse and de-criminalizing teenage sexual activities. As demonstrated by the cases cited above, the compromise is not always consistent or logical.

In the present case, the Tenth Circuit Court of Appeals recognized that the present case was one "where an exercise of *Booker* discretion could mitigate a sentence . . ." *United States v. Hernandez-Castillo*, 449 F.3d 1127, 1132 (10th Cir. 2006). Contrary to the government, petitioner's challenge is not "untimely." The *Kristl* "two-step" application of *Booker*, as well as the 2006 dialogue on criminal convictions for consensual teenage sex all occurred after appellate briefing was completed in December 2005.

CONCLUSION

Petitioner requests this Court to take the opportunity to provide more explicit, non-presumptive standards for the consideration of the reasonableness of a sentence and to straighten out the confusion concerning the fictional violence in criminally sanctioned consensual sex.

This Court should grant the petition for a writ of certiorari and reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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